

Before a Hearings Panel  
Appointed by the Otago Regional Council

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*under:* the Resource Management Act 1991

*in the matter of:* submissions and further submissions in relation to the  
Proposed Otago Regional Policy Statement 2021  
(excluding parts determined to be a freshwater planning  
instrument)

*and:* **Christchurch International Airport Limited**  
*Submitter 0307*

Supplementary legal submissions on behalf of Christchurch  
International Airport Limited

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Dated: 21 April 2023

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## **MAY IT PLEASE THE HEARINGS PANEL**

### **INTRODUCTION**

- 1 These supplementary legal submissions are provided on behalf of Christchurch International Airport Limited (*CIAL*). At the hearing on 14 March 2023 we sought leave to file supplementary submissions.
- 2 They address matters that arose during the Energy, Infrastructure and Transport (*EIT*) hearing, in particular in relation to the definitions of "Regionally Significant Infrastructure" (*RSI Definition*) and "Nationally Significant Infrastructure" (*NSI Definition*). *CIAL's* suggested wording for these definitions is set out below.

### **DEFINITIONS**

- 3 *CIAL* presented at the *EIT* hearing on 14 March 2023. The focus of *CIAL's* evidence and hearing presentation was the *RSI Definition*. As outlined at the hearing, *CIAL* seeks changes to the *RSI Definition* so that the "airports" component (subclause 6) is not limited to the Otago region's existing airport infrastructure assets, but enables the consideration of new airport infrastructure under the proposed Otago Regional Policy Statement (*pORPS*) framework.
- 4 Prior to *CIAL's* presentation, during the hearing session on 13 March 2023, the reporting officer, Mr Langman, indicated that he agreed in principle with the changes *CIAL* seeks to the *RSI Definition*. During *CIAL's* presentation, Mr Langman suggested that the airport component (subclause 6) should not include "ancillary commercial activities", as is the approach taken in the relevant part (subclause h) of the *NSI Definition*.
- 5 Discussion followed between the Panel, Mr Langman and *CIAL's* representatives as to the appropriate scope of a modern airport and what activities, including commercial activities not directly linked to core aviation activities, might or might not come within that concept. The short point is that the definition and concept of a modern airport has been well-traversed by the Courts, most notably in the *McElroy* (also known as *Craigie Trust*) cases in the Court of Appeal and High Court.<sup>1</sup>
- 6 Those cases have confirmed the broad scope of activities encompassed by the term "airport" in order to enable the proper functioning of a modern airport. This includes those often described as directly linked to core aviation activities (such as the terminals, navigation, freight, emergency services and other such facilities), and those often described as not directly linked to core aviation

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<sup>1</sup> *McElroy v Auckland International Airport* [2009] NZCA 621; and *McElroy v Auckland International Airport Ltd* CIV 2006 404 005980 27 June 2009 Williams J HC.

activities (such as rental car companies, retail and food outlets, shopping outlets, hotels, childcare facilities, and government agencies servicing national and international travellers).

- 7 As the High Court stated in the Auckland International Airport context in *McElroy*:<sup>2</sup>

*Examples include the provision of banking facilities for the millions of travellers and thousands of staff at Auckland Airport and the rental car and campervan parking and the supermarket servicing airport users and inbound tourists. Food outlets can be similarly regarded. Even Butterfly Creek, though primarily recreational, offers convention facilities, now an important facility at airports.*

- 8 CIAL's firm position is that this matter is settled law which need not, and should not, be re-litigated in this process. The scope of a modern airport is well established and should not be inappropriately restricted in this context. To do so would have significant implications for the functioning and upgrade of any (existing and future) airport infrastructure assets in the Otago region.
- 9 On this basis, Mr Langman's suggested addition of "excludes ancillary commercial activities" in subclause 6 of the RSI Definition should not be accepted. We have considered whether some alternative wording in subclause 6 to clarify the scope of a modern airport would be appropriate. In our submission, this would add uncertainty and confusion to an area of law that has been the subject of litigation and is now well-settled, and would be inconsistent with the general use of the terms "airports and aerodromes".
- 10 However, CIAL notes the potential inconsistency properly raised by Queenstown Airport Corporation (QAC) in that, with the exception of Dunedin, Queenstown and Wānaka Airports, the other airports listed in subclause 6 are not used by aeroplanes capable of carrying more than 30 passengers. CIAL's therefore suggests that its proposed changes are moved to the end, rather than then start, of the subclause. This would more clearly enable the protection of existing airport infrastructure as well as enabling future airport infrastructure. On this basis, the amended subclause 6 would read (with CIAL's changes shown in red and underlined):

**Regionally significant infrastructure** means: ...

6. the following airports: Dunedin, Queenstown, ~~Wanaka~~ Wānaka, Alexandra, Balclutha, Cromwell, ~~Ōamaru~~ Ōamaru, Taieri and any other airports and aerodromes used for regular air transport services by aeroplanes capable of carrying more than 30 passengers.

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<sup>2</sup> *McElroy v Auckland International Airport Ltd* CIV 2006 404 005980 27 June 2009 Williams J HC at [202].

- 11 In our submission, CIAL’s suggested changes to the RSI Definition are the most appropriate approach to resolving the issue identified with subclause 6 as notified and achieving the objectives of the pORPS, and should be accepted.
- 12 Mr Langman referred to the airports component (subclause g) of the NSI Definition, which provides:

***Nationally significant infrastructure*** has, to the extent applicable to the Otago Region, the same meaning as in clause 1.4(1) of the **National Policy Statement for Urban Development 2020** (as set out in the box below)

means all of the following:

...

- g. any airport (but not its ancillary commercial activities) used for regular air transport services by aeroplanes capable of carrying more than 30 passengers

- 13 In response to Mr Langman’s comments and the discussion at the hearing, CIAL considers that a consequential change to subclause h of the NSI definition is necessary for the same reasons as set out above. This would read:

- g. any airport ~~(but not its ancillary commercial activities)~~ used for regular air transport services by aeroplanes capable of carrying more than 30 passengers

- 14 It is noted that the NSI Definition is taken directly from the National Policy Statement for Urban Development 2020 (NPS-UD). However, “nationally significant infrastructure” is defined in the NPS-UD solely for the purpose of specifying “qualifying matters”.<sup>3</sup>
- 15 A qualifying matter is a mechanism that enables a limitation on the level of development (or intensification) otherwise required by the NPS-UD. Qualifying matter (c) in clause 3.32 of the NPS-UD is “any matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure”.
- 16 The definition of “nationally significant infrastructure” in the NPS-UD is therefore for a specific purpose and, by its nature, covers only the core of what it is intended to protect. As another example, qualifying matter (d) in clause 3.32 of the NPS-UD is “open space provided for public use, but only in relation to the land that is open space”.

<sup>3</sup> See clause 3.32 of the NPS-UD which contains qualifying matter (c), “any matter required for the purpose of ensuring the safe or efficient operation of nationally significant infrastructure”.

- 17 In contrast, the NSI Definition in the pORPS has much broader planning implications under the entirety of the pORPS itself and the lower-order planning documents for the Otago region. In our submission, subclause g of the NSI Definition should not be limited so that it only covers activities directly linked to core aviation activities. It should cover all activities that are lawfully (as per *McElroy*) part of a modern airport. Preventing the benefits of the nationally significant infrastructure provisions applying to these activities has the potential to impact the functioning, upgrade and establishment of airport infrastructure assets in the region. In our submission, CIAL's suggested changes set out at paragraph 13 above should be implemented.
- 18 We note CIAL's submission on the pORPS (page 1, paragraph 5.2) sought any other similar relief that would deal with CIAL's concerns set out in the submission. It is considered that this gives sufficient scope to make the consequential change proposed to subclause g of the NSI Definition.
- 19 Even if the Panel does not accept CIAL's suggested changes to the NSI Definition, CIAL considers its suggested changes to the RSI Definition stand alone and there is no need for an exclusion of ancillary commercial activities in subclause 6 of the RSI Definition. This is because, as outlined at the hearing, airports constitute both nationally and regionally significant infrastructure and are recognised as such for different purposes. While there will be overlap, different aspects and functions of an airport (existing and new) contribute to its national and regional significance.

#### **OTHER MATTERS**

- 20 Over the course of the EIT hearing, common questions were asked of submitters by the Panel in relation to the RSI Definition. As CIAL was the first submitter to be heard, this section of our submissions briefly responds to questions asked of other submitters after CIAL's presentation which CIAL did not have the opportunity to respond to.
- 21 Counsel for Dunedin International Airport Limited (*DIAL*) submitted that if new (airport) infrastructure is to be established, the policy framework should be clear about potential conflicts between new and existing infrastructure.
- 22 Discussion between counsel for DIAL and the Panel followed and it became clear from the Panel's questions and the discussion that the policy framework (namely EIT-INF-P15) already appropriately deals with *direct* effects on nationally and regionally significant infrastructure from new activities establishing (including if that new activity is also nationally and regionally significant infrastructure). CIAL agrees and notes this is common and standard planning practice across the country.

- 23 The Panel asked counsel for DIAL if this matter was raised with an element of concern around competition. Counsel for DIAL responded that it was not, and instead suggested there was a direct issue around airspace control and a longer-term, admittedly speculative interest, in carbon emissions allocation.
- 24 In response, CIAL notes that the “direct issues” raised by DIAL are not resource-management related issues. Rather, they are matters governed by civil aviation and climate change legislation. Further, they are not matters on which this Panel has any evidence. If these matters were in any way relevant, they would be considered in relation to a particular proposal, not at this overarching plan-making stage.
- 25 CIAL agrees with the Panel’s proper characterisation of the matter that a commercial (rather than physical) constraint is a trade competition issue. CIAL would be concerned if trade competition issues arose in this broad and important context of setting the strategic planning direction for the Otago region. As the Panel rightly noted, trade competition and the effects of trade competition are precluded from the Panel’s consideration under section 61(3) of the RMA.
- 26 Counsel for QAC suggested that the policy framework gives preference to existing infrastructure and that new infrastructure does not obtain the benefits of the policy framework until it is in operation. As was clear from the Panel’s questions and subsequent discussion, such an approach would not be standard planning practice and would not enable the pORPS to appropriately anticipate and provide for the region’s future needs.

### **CONCLUSION**

- 27 In conclusion, the position for CIAL is that its suggested changes to the RSI Definition (as set out above) and the NSI Definition (as set out above) are the most appropriate way to meet the relevant objectives of the pORPS contained in the Infrastructure and Transport sections.<sup>4</sup>

Dated: 21 April 2023




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<sup>4</sup> E.g., EIT-INF-04, EIT-INF-05, EIT-TRAN-07, EIT-TRAN-08 and EIT-TRAN-09.